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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 576

THERON C. LYND, REGISTRAR OF ELECTIONS OF FORREST COUNTY, MISSISSIPPI, PETITIONER

v.

ROBERT F. KENNEDY, AS ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 148–149) is not reported. The opinion of the court of appeals (R. 154) is reported at 306 F. 2d 222.

JURISDICTION

The opinion (R. 154–170) and order (R. 171) of the court of appeals were entered on July 11, 1962. Petitioner's motion for rehearing was denied on August 8, 1962 (R. 197). The petition for a writ of certiorari was filed on November 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the order of the district court remanding the cause to its files was an appealable order.

2. Whether the Attorney General's demand for records complied with requirements of Title III of the Civil Rights Act of 1960 in stating the "basis and purpose" of the request.

3. Whether the district court erred in treating the Title III enforcement proceeding as mooted by the filing of a Rule 34 motion in a subsequent proceeding under 42 U.S.C. 1971.

STATUTE INVOLVED

Title III of the Civil Rights Act of 1960 (74 Stat. 86, *et seq.*, 42 U.S.C., Supp. II, 1974, *et seq.*) provides:

> SEC. 301.—Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve

any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

SEC. 302.—Any person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by section 301 to be retained and preserved shall be fined not more than $1,000 or imprisoned not more than one year, or both.

SEC. 303.—Any record or paper required by section 301 to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representative. This demand shall contain a statement of the basis and the purpose therefor.

SEC. 304.—Unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose any record or paper produced pursuant to this title, or any reproduction or copy, except to Congress and any committee thereof, governmental agencies, and in the presentation of any case or proceeding before any court or grand jury.

SEC. 305.—The United States district court for the district in which a demand is made pur-

suant to section 303; or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper.

SEC. 306.—As used in this title, the term, "officer of election" means any person who, under color of any Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting in any general, special, or primary election at which votes are cast for candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico.

STATEMENT

On August 11, 1960, acting pursuant to section 303 of the Civil Rights Act of 1960 (42 U.S.C. 1974(b), 74 Stat. 88), the Attorney General requested the Registrar of Elections of Forrest County, Mississippi, to make available for inspection and copying various records and papers pertaining to registration and voting (R. 3; 6–7). On August 23, 1960, counsel for petitioner requested a ninety-day extension in which to reply (R. 4; 7–8). The government agreed to a twenty-one day extension until September 16, 1960 (R. 4; 8–9). On September 15, 1960, counsel for petitioner repeated the request for the full ninety-day extension (R. 4, 9–10). On October 10, 1960, petitioner declined to turn over the records, but some indication was

given that compliance might be forthcoming (R. 4–5; 10–11). When negotiations failed, an enforcement action was filed (January 19, 1961) (R. 2). At that time, the district court designated March 13, 1961, as the date for hearing.

On March 13, 1961—moments before the hearing was scheduled to commence before Judge Mize (R. 18)—counsel for petitioner served a motion "to remand this cause to the files, or suspend the proceedings herein, or dismiss same as abated * * * until Honorable Robert F. Kennedy has himself as Attorney General of the United States been properly substituted herein in the place and stead of Honorable W. P. Rogers as United States Attorney General" (R. 11–12). Deeming the question of substitution "very important" (R. 36), the judge continued the hearing, allowing 45 days to brief the point (R. 37–38). Although respondent did not believe that a formal substitution was necessary under the circumstances, nevertheless, in order to expedite the proceeding, he submitted a motion to substitute himself for former Attorney General Rogers. On April 4, 1961, the court ordered the substitution (R. 39–40).

Thereafter, counsel for petitioner requested an additional sixty day extension in which to plead (R. 42–47). On April 13, 1961, the district court granted petitioner thirty days in which to file all preliminary motions and an additional ten days in which to file an answer and any further motions (R. 47–48). On May 22, 1961, another hearing was held before Judge Mize (R. 72). At that time petitioner submitted numerous motions, unaccompanied by support-

ing legal memoranda (R. 58–71). Several motions attacked the constitutionality of Title III of the Civil Rights Act of 1960 (R. 70–71). Counsel for the government, relying on *In re Crum Dinkens*, 187 F. Supp. 848 (M.D. Ala.), affirmed, 285 F. 2d 430 (C.A. 5), certiorari denied, 366 U.S. 913, urged that briefing the constitutionality of Title III was unnecessary (R. 93–94). But Judge Mize permitted the petitioner forty days to brief the constitutionality of Title III, as well as the procedural matters raised by petitioners. The government was given fifteen days to respond (R. 88). The government's response was filed on July 18, 1961.

While the Title III proceeding was pending before Judge Mize, on July 6, 1961, the United States filed a complaint under 42 U.S.C. 1971, naming as defendants the Registrar of Elections of Forrest County and the State of Mississippi (R. 148).[1] At the same time a motion for discovery was made under Rule 34, Federal Rules of Civil Procedure (R. 148). Early in January, 1962, Judge Cox announced that Judge Mize, who had had the Title III proceeding under advisement since July 18 and had not yet decided it, had transferred that proceeding to him and that he would consider it at the same time he heard the government's section 1971 action. A hearing was held before Judge Cox on January 13, 1962, at which the arguments previously made were repeated (R. 96, *et seq.*). On January 15, 1962, Judge Cox rendered an

[1] Section 1971 broadly authorizes the United States to institute a civil action for preventive relief where there is interference or threatened interference with the right to vote.

opinion in which he held that by filing the 1971 action the government had abandoned its Title III proceeding.

Shortly thereafter, on January 26, 1962, Judge Cox entered an order in the section 1971 action striking from the complaint all incidents antedating February 26, 1959—the beginning of the tenure of the present registrar. He ruled that all evidence and testimony in the case would be limited to the period following February 26, 1959. And, on March 7, 1962, at the close of the hearing on the preliminary injunction in the section 1971 suit, the court granted the government's motion for discovery under Rule 34 but restricted it to records—*e.g.*, voting applications, affidavits and certificates to vote, and transfer applications—made during the tenure in office of the present registrar (February 26, 1959 to the present).

On February 16, 1962, the district court entered a formal order in the Title III proceeding in conformity with its opinion of January 15, 1962, in which it directed that the Attorney General's application "and all motions of the defendant heretofore filed herein, be and the same are hereby remanded to the files of this Court." On July 11, 1962, the court of appeals vacated the order of the district court and directed it to grant respondent's application to inspect the voting records of Forrest County.[2]

[2] The district court issued the enforcement order on August 2, 1962, and the government has inspected and photographed records which were in Mr. Lynd's possession on August 10. Since, however, it may well become necessary for the government to inspect records which will have accrued after August 10, 1962, the issues raised by petitioner cannot be considered moot.

ARGUMENT

1. The order of the district court was final and appealable. The order of February 16, 1962 provided that "the complaint and all motions of the defendant heretofore filed herein, be and the same are hereby remanded to the files of this Court" (R. 156). In its opinion, the district court made clear the degree of finality it attached to this action. It said (R. 149):

> * * * when the complaint in Cause No. 1646 [the 1971 action] was filed accompanied by its Rule 34 motion * * * the Plaintiff thereby abandoned in its entirety said Cause Number 1604 [the Title III proceeding] * * *. The Court * * * adjudges Case No. 1604 as abandoned and effectually non-existent and a proper order to the effect indicated may be presented for entry.

When the district court remanded the Title III proceeding to the files, it effectively refused enforcement to the rights of respondent. It obviously intended its order to make a final disposition of the action before it. And it determined substantial rights of the parties which would have been irreparably lost if the appellate court had not acted. *Kennedy* v. *Bruce*, 298 F. 2d 860, 863–864 (C.A. 5). See also *United States* v. *Lynd*, 301 F. 2d 818 (C.A. 5), certiorari denied, No. 355, October Term 1962. The order clearly met the test of finality governing appeals. Cf. *United States* v. *Wood*, 295 F. 2d 772, 778 (C.A. 5), certiorari denied, 369 U.S. 850; *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541; *Sears, Roebuck & Co.* v.

Mackey, 351 U.S. 427; *Burns* v. *Ohio*, 360 U.S. 252; *Swift & Co.* v. *Compania Colombiana Del Caribe*, 339 U.S. 684; *Glen Oaks Utilities, Inc.* v. *City of Houston*, 280 F. 2d 330 (C.A. 5).[3]

2. Petitioner contends (Pet. 15) that the demand for records made upon him by the Attorney General did not satisfy the statutory requirement that "[t]his demand shall contain a statement of the basis and the purpose therefor," and that the court of appeals erred in holding that "the factual foundation for, or the sufficiency of, the Attorney General's statement * * * is not open to judicial review or ascertainment."

The short answer to this contention is that the Attorney General's request for records did state the basis and purpose of the demand. The initial letter to the registrar expressly stated (R. 6):

> This demand is based upon information in the possession of the Attorney General tending to show that distinctions on the basis of race or color have been made with respect to registration and voting within your jurisdiction.
>
> The purpose of this demand is to examine the aforesaid records in order to ascertain whether or not violations of Federal law in regard to registration and voting have occurred.

Considering the summary nature of the proceeding contemplated, these allegations are clearly sufficient and there was no occasion for a motion for a more

[3] *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176, cited by petitioner (Pet. 9–10), did not involve an order which effectively disposed of the controversy. The order in *Bodinger* was merely a denial of a stay to permit special arbitration proceedings.

definite statement under Rule 12(e) of the Federal Rules of Civil Procedure. See *United States* v. *Lynd, supra; In re Crum Dinkens,* 187 F. Supp. 848, affirmed (*sub nom. Dinkens* v. *Attorney General*), 285 F. 2d 430, certiorari denied, 366 U.S. 913;[4] *Kennedy* v. *Bruce, supra; In re Coleman,* 208 F. Supp. 199 (S.D. Miss.). In any event, Title III of the 1960 Act does not contemplate judicial review of the basis for the Attorney General's action. See *In re Crum Dinkens, supra;* see also, 106 Cong. Rec. 7767, remarks of Senator Keating.

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[4] In *Dinkens*, the Attorney General objected to interrogatories served upon him—interrogatories seeking information essentially similar to that sought pursuant to Rule 12(e) in the instant case. His objection was sustained by the district court (Transcript of Record, *Dinkens* v. *Attorney General*, No. 18562, pp. 20, 38, 48) (C.A. 5). On appeal, the Board of Registrars of Montgomery County, Alabama, specifically alleged as error the district court's failure to require a response to the interrogatories (Brief for Appellants, pp. 3, 6–7). The Attorney General, in his brief, argued that the district court properly disposed of the interrogatories (Brief for Appellee, pp. 28–31). The court of appeals affirmed the judgment of the district court, 285 F. 2d 430. Again, in their petition for writ of certiorari, the Board of Registrars presented the question of whether "the Attorney General can be compelled to disclose the names and addresses of persons having knowledge of the relevant facts which form the basis of the demand and application for relief thereunder" (Petition for Certiorari, p. 2, No. 823, October Term 1960), and specifically argued that "the Courts below erred in refusing to require the Respondent to answer interrogatories 9, 10 and 11" (Petition for Certiorari, *supra*, p. 6). The response to the petition challenged this contention of the Board of Registrars (Brief for Respondent, p. 8).

3. Under Title III of the Civil Rights Act of 1960, the Attorney General was entitled to an order making voting records promptly available. *Kennedy* v. *Bruce*, *supra*. Instead, more than a year after the filing of the government's application, the court still refused to enter such an order, on the theory that the government had "abandoned" its Title III proceeding by bringing an action under 42 U.S.C. 1971 against the same defendant and filing a Rule 34 motion therein (R. 148–149). As above indicated, the district court did grant the government's motion for discovery under Rule 34 in the section 1971 proceeding, some three weeks after denying the Title III application, but limited it in three significant respects: (1) it did not grant the motion until the government had completed its case on the motion for preliminary injunction; (2) it denied access to documents antedating February 26, 1959; and (3) it refused discovery of poll tax books and lists. The net result is that the Attorney General was denied the prompt and complete compliance to which he was entitled in the Title III proceeding.

Thus, it was plainly wrong to view the Rule 34 motion as terminating the Title III proceeding. The court of appeals correctly held that "[t]he right of the Attorney General to secure judicial enforcement of the written demand, § 1974b, is not affected in any way by the pendency of a § 1971 case or the right of discovery in such case under the Federal Rules of Civil Procedure. The two proceedings are distinct and distinctively separate" (R. 161).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition should be denied.

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DECEMBER 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1962